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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 397

CYRIL T. FANECA, JR., PETITIONER

v.

UNITED STATES OF AMERICA, NICHOLAS deB. KATZENBACH, AND JAMES P. McSHANE

No. 359 Misc.

VIRGIL NORTON, JAMES CHAPMAN, AND VIRGIL WESLEY, PETITIONERS

v.

JAMES P. McSHANE, NICHOLAS deB. KATZENBACH, JOHN DOAR, AND WILLIAM TUCKER

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (N. Pet. App. 7; F. Pet. A1–A37)[1] are reported at 332 F. 2d 855, 872.

[1] "N. Pet." and "N. Pet. App." refer to the petition and appendices in No. 359 Misc. "F. Pet." refers to the petition in No. 397.

The opinion of the district court in No. 359 Misc. (N. Pet. App. 6) is reported at 33 F.R.D. 131.

JURISDICTION

The judgments of the court of appeals were entered on June 1, 1964. A timely petition for rehearing by petitioners in No. 359 Misc. was denied on July 15, 1964. The petition for a writ of certiorari in No. 359 Misc. was filed on August 12, 1964. The petition for a writ of certiorari in No. 397 was filed on August 18, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the individual respondents were entitled to summary judgment in damage suits brought against them for acts performed by them in their official capacities while they were assisting in the execution of court orders.

2. Whether the United States is liable under the Federal Tort Claims Act for injuries resulting from the individual respondents' conduct in the execution of court orders.

STATUTE INVOLVED

28 U.S.C. 2680 provides, in pertinent part:

> The provisions of this chapter and Section 1346(b) of this title shall not apply to—
>
> (a) Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> * * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

STATEMENT

These are civil actions arising out of the government's efforts on September 30 and October 1, 1962, to enforce orders of the Court of Appeals for the Fifth Circuit and of the District Court for the Southern District of Mississippi relating to the admission and enrollment of James H. Meredith, a Negro, as a student at the University of Mississippi. Respondent Katzenbach was then Deputy Attorney General of the United States; respondent McShane was Chief of the Executive Office of United States Marshals; respondent Doar was First Assistant to the Assistant Attorney General-in-charge of the Civil Rights Division; and respondent Tucker was a Deputy United States Marshal. All were sent, along with other government personnel, to Oxford, Mississippi, to aid in the peaceful execution of the court orders directing that Meredith be enrolled at the university. See *Meredith* v. *Fair*, 305 F. 2d 343 (C.A. 5).

The facts and district court proceedings in each of the cases may be briefly summarized:

No. 397 ("Faneca").—On the evening of September 30, 1962, when Meredith was to be escorted to the university by federal officials and registered there, a large and boisterous crowd gathered around the building where the registration was to take place (R.

72a(2)).[2] Deputy United States Marshals were stationed on the premises since it was anticipated that local officials would be unprepared to keep order during the registration (R. 54a–55a; McShane deposition 17–28). In addition, the President of the United States, by Executive Order, had directed the Secretary of Defense "to take all appropriate steps to enforce all orders" of the court of appeals and the district court pertaining to Meredith's admission, Executive Order No. 11053, 27 Fed. Reg. 9693.

At approximately 8:00 p.m. on September 30 the crowd, which had been boisterous, became violent and began to advance towards the university building and the marshals who were guarding it (R. 77a, 80a–82a). Respondent McShane, who was in charge of the force of marshals, thereupon ordered them to fire tear gas in order to disperse the mob (R. 59a, 79a). Petitioner, who was a student at the university, had first arrived on the scene at approximately 6:45 p.m. and then joined the crowd, which was yelling and flicking cigarette butts at the marshals (R. 88a–91a). When the tear gas was fired shortly after 8:00 p.m., petitioner and a female companion left the area. Petitioner then circled the building and reached a point at its northwest corner. A group of marshals approached him there and allegedly fired tear gas at him over his protest (R. 102a–106a).[3]

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[2] "R." refers to the respondents' appendix in the court of appeals, which contains the affidavits and depositions filed in the district court in *Faneca*, and which we have filed with the Clerk of this Court.

[3] In his deposition, petitioner testified that after the tear gas was fired, he and his companion left the campus and went to

Petitioner brought suit in the United States District Court for the Southern District of Mississippi against the United States and the individual respondents under the Federal Tort Claims Act, 28 U.S.C. 1346(b), and the Civil Rights Act, 42 U.S.C. 1983, alleging that the tear gas had been fired at him "wrongfully and negligently," and that respondents' conduct had violated his constitutional rights of assembly and speech and deprived him of liberty without due process of law. The district court denied respondents' motion for summary judgment, but certified the case for interlocutory appeal under 28 U.S.C. 1292(b).

No. 359 Misc. (*"Norton"*).—Petitioners, who are residents of Pike County, Alabama, were arrested on October 1, 1962, while riding in an automobile approximately four miles east of Oxford, Mississippi.[4] Subsequently, they brought suit in the Circuit Court of Lafayette County, Mississippi, alleging that after

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a restaurant. He returned to the building where the registration took place at about midnight, and remained there until 1:00 a.m. He did not consult a physician or seek treatment at a hospital or at the university's infirmary. He did, however, take aspirin for relief of a headache (R. 107a; Faneca deposition pp. 13–18, 52–60).

[4] In its present posture the record does not clearly reflect the reason for petitioners' arrest. It is relevant, however, to note that prior to instituting suit, petitioners Chapman and Norton filed motions in the United States District Court for the Northern District of Mississippi for the return of weapons taken from them at the time and place of their arrest and for the suppression of these weapons as evidence. The weapons were three shotguns and a 22-calibre Baretta pistol. The district court denied these motions on May 9, 1963. *Chapman* v. *United States*, Civil No. W-M-16-62; *Norton* v. *United States*, Civil No. W-M-17-62.

being arrested they had been confined in a small building for at least 18 hours, during which time they were given no food or drink and were not permitted to speak. As a result of this and other alleged mistreatment, petitioners contended that respondents had committed false arrest and assault and battery, and had conspired to deprive petitioners of the equal protection of the laws.

On motion of respondents, the case was removed to the United States District Court for the Northern District of Mississippi. Respondents then filed an affidavit of the Attorney General stating that "at all relevant times and places set forth in the complaints" respondents "were discharging their official governmental responsibilities," and moved for dismissal. The district court, treating the motion as one for summary judgment, entered summary judgment for respondents on the ground that they were immune from suit since at the times and places alleged in the complaints respondents were "engaged in the performance of their official duties, including the execution and enforcement of orders of the United States District Court for the Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit" (N. Pet. App. 6).

The court of appeals heard both cases together. It directed the entry of summary judgment in *Faneca* and affirmed the entry of summary judgment in *Norton*. Judge Gewin concurred in the dismissal of the claim against the United States in *Faneca*, but dissented in both cases with respect to the claims against the individual respondents.

ARGUMENT

The court of appeals correctly concluded that on the uncontradicted facts of all these cases the individual respondents were acting within the scope of their official duties and that they were, therefore, immune from liability under a consistent course of decisions of this Court culminating with *Barr* v. *Matteo*, 360 U.S. 564, and *Howard* v. *Lyons*, 360 U.S. 593. The court of appeals was also correct in determining that the United States was not subject to liability under the Federal Tort Claims Act for conduct such as that involved here. The decisions of the court of appeals do not conflict with decisions of any other courts of appeals or of this Court; nor do they raise any significant question of law warranting review by this Court.

1. Affidavits by Attorney General Kennedy were filed in both *Faneca* and *Norton*. The affidavits stated that on September 30 and October 1, 1962, the individual respondents were "at my direction * * * upon the campus of the University of Mississippi in the performance of their official duties." According to the affidavits, respondent Katzenbach "supervised and directed all United States Marshals and their deputies in the performance of their official duties, including the execution and enforcement of all lawful orders entered by the United States District Court for the Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit, and the removal of all obstructions of justice to insure that said orders of the Courts were executed and enforced." Respondent McShane was similarly assigned "at [the

Attorney General's] direction" to assist in the enforcement of the court orders "and the removal of all obstructions of justice to insure that said orders of the Courts were executed and enforced." Respondents Doar and Tucker were also directed by the Attorney General to assist at the university and were, according to the affidavits, "discharging their official governmental responsibilities" at the times and places alleged in the complaints (N. Pet. App. 4; R. 45a–46a).[5]

Here, as in *Howard* v. *Lyons*, 360 U.S. 593, 597, the district courts had before them "uncontradicted affidavits" that the acts which were allegedly tortious were committed in the discharge of respondents' official duties. Accordingly, summary judgment was the appropriate means of guaranteeing the privilege from suit which, as this Court observed in *Barr* v. *Matteo*, 360 U.S. at 572–573, constitutes "an expression of a policy designed to aid in the effective functioning of government." It is no less true in the present circumstances than it was in *Barr* v. *Matteo* "that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which

[5] The contention made by petitioners in *Norton* that the Attorney General's affidavit could not be relied upon because it was not based on personal knowledge (N. Pet. 15–16) obviously raises no significant issue of law. Moreover, no objection on that ground was made in the district court. See, *e.g.*, *Mitchell* v. *Dooley Bros. Inc.*, 286 F. 2d 40, 42 (C.A. 1), certiorari denied, 366 U.S. 911; *Klingman* v. *National Indemnity Co.*, 317 F. 2d 850, 854 (C.A. 7).

would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." 360 U.S. at 571. Indeed, the present case is more compelling than *Barr* v. *Matteo* because the allegations here did not primarily charge the government officials with having acted out of malice.[6] Hence, recognizing the immunity asserted here by the individual respondents would not amount—as did the immunity in *Barr* v. *Matteo*—to recognition of an "absolute" privilege, but only to "protection against the consequences of * * * honest mistakes." 360 U.S. at 588 (Brennan, J., dissenting).

The decisions in *Barr* v. *Matteo, supra,* and *Howard* v. *Lyons, supra,* accorded with the well-established principle that a federal official cannot be held personally liable for an act which is committed within the general scope of his official authority and in pursuance of his official duties. See *Spalding* v. *Vilas,* 161 U.S. 483; *Alzua* v. *Johnson,* 231 U.S. 106; *Yaselli* v. *Goff,* 275 U.S. 503. The principle has been applied in a considerable number of cases involving different officials under varying circumstances,[7] and it was properly applied here. As the court of appeals observed, "the selection of a proper method of enforcing

[6] In *Norton* the petitioners did allege at one point in their complaint that the "Defendants acted maliciously and were guilty of a wanton disregard of the rights and feelings of Plaintiff" (N. Pet. App. 1, p. 3). But the remainder of the complaint did not charge malicious conduct.

[7] See, for example, the many cases cited in footnote 5 of the court of appeals' opinion in *Norton* (N. Pet. App. 7, pp. 5–6; F. Pet. A 13).

a court's orders in the face of active opposition and obstruction is a decision which it is necessary that these officers be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability" (N. Pet. App. 7, p. 9; F. Pet. A 17).

2. The court of appeals was also correct in its alternative holding that 42 U.S.C. 1983 does not apply to persons acting under color of federal law. The statute expressly provides for liability with respect to "[e]very person who, under color of any statute, ordinance, regulation, custom or usage, of *any State or Territory* * * *" subjects anyone to the deprivation of constitutional rights. (Emphasis added.) There is no reason to read a statute "so plainly limited" to acts done under color of State law (*Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (C.A. 2), certiorari denied, 339 U.S. 949) as applicable to acts committed under color of federal law.[8]

3. The court of appeals properly dismissed petitioner Faneca's action against the United States under the Federal Tort Claims Act. Insofar as the claims made in these suits were essentially claims for assault and battery or false imprisonment, they were excepted from the coverage of the Federal Tort Claims Act by

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[8] The comparable criminal Civil Rights Act provision, 18 U.S.C. 242, on which petitioner Faneca relies (F. Pet. 13–15), applies to persons acting "under color of *any* law." Cases such as *Screws* v. *United States*, 325 U.S. 91, and *Logan* v. *United States*, 144 U.S. 263, are, therefore, inapplicable. Similarly inapposite are *Monroe* v. *Pape*, 365 U.S. 167, and *Nesmith* v. *Alford*, 318 F. 2d 110 (C.A. 5), certiorari denied, 375 U.S. 975, which were suits against State officers acting under color of *State* law.

28 U.S.C. 2680(h). See p. 3, *supra*.[9] To the extent that the orders given by respondents Katzenbach and McShane regarding the firing of the tear gas and the selection of "unskilled, immature, or unseasoned" marshals (R. 15a) were allegedly negligent, the Federal Tort Claims Act is inapplicable because of the "discretionary function" exception of 28 U.S.C. 2680 (a) (p. 2, *supra*). As this Court observed in *Dalehite* v. *United States*, 346 U.S. 15, 36, "Where there is room for policy judgment and decision there is discretion." The present case involved a clear instance of the exercise of "policy judgment" which had been delegated by the Attorney General to his on-the-scene representatives, respondents Katzenbach and McShane.

CONCLUSION

For the reasons stated, we respectfully submit that the petitions for writs of certiorari should be denied.

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SEPTEMBER 1964.

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[9] See *Lewis* v. *United States*, 194 F. 2d 689 (C.A. 3) (use of excessive force by military sentry within assault and battery exception); *Stepp* v. *United States*, 207 F. 2d 909 (C.A. 4), certiorari denied, 347 U.S. 933 (use of excessive force by army guard within assault and battery exception); *Alaniz* v. *United States*, 257 F. 2d 108 (C.A. 10) (shooting of apparent suspect by deputy sheriff within assault and battery exception); *Klein* v. *United States*, 268 F. 2d 63 (C.A. 2) (exposure of individual to chill and elements and mental indignity by FBI agents and customs officers within assault and battery exception).

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